

REQUEST FOR CITY COUNCIL CONSIDERATION

Meeting Date: August 22, 2022

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| Agenda Item: 2B | Prepared by: Chris Noury, City Attorney |
| Agenda Section: Business: Second Public Hearing | Date: August 18, 2022 |
| Subject: Second Public Hearing regarding the Development Agreement for the Consumer Beverage Packaging and Distribution site | Division: Legal |

Main elements of the Development Agreement (DA) regarding the Consumer Beverage Packaging and Distribution site:

1. **Term:** The Parkway Planned Development District (PDD) DA was executed on January 9, 2009 and expires on January 9, 2029.
2. **Improvements to Water Tower Road:** The Developer shall widen the existing public right-of-way of Water Tower Road, as depicted in Exhibit D, to accommodate turning movements, concurrently with the sitework improvements for the first building within the amended Site Plan Parcel.

The improvements will be complete or bonded no later than the issuance of a CO for the first building within the amended Site Plan Parcel.

3. **Financial Contribution to Comply with the Complete Streets portion of the City's LDRs:** The Developer shall pay \$115,000, in two separate and equal installments, the first of which is due on or before the issuance of the building permit for the first building within the amended Site Plan Parcel. The second installment shall be due before the issuance of the CO for the first building within the amended Site Plan Parcel.
4. **Open Space:** The project shall contain not less than 20% open space which shall include protected wetlands, required buffers, ponds, green space, or other undeveloped acreage within the project.
5. **Maintenance and Mowing:** The Developer will mow the undeveloped property no less than eight times a year until the project is fully developed. Mowing shall occur between March 1 and November 30 of each year. Removal of any fallen trees on the undeveloped property will occur during the above referenced schedule.
6. **Jurisdictional and Non-jurisdictional Waters:** Jurisdictional and non-jurisdictional waters within the project which are not mitigated, filled, or otherwise modified shall be surrounded by a water quality buffer of not less than 20' in width within which no building shall occur.
7. **Prohibition Against Conservation Easements:** The Developer agrees not to subject the property to a conservation easement or other restrictive covenant regarding any portion of the property shown as single homes or amenities on the approved concept plan.

Recommended Action:

Allow comments from the public regarding the proposed Development Agreement

Reviewed by City Manager

Reviewed by City Attorney

Council Action:

Motion By _____ 2nd By _____ To _____

STATE OF SOUTH CAROLINA)
)
)
COUNTY OF HORRY)

**SEPARATE AND INDEPENDENT
AMENDMENT TO THE MASTER
DEVELOPMENT AGREEMENT
(Consumer Beverage Packaging and Distribution)**

THIS SEPARATE AND INDEPENDENT AMENDMENT TO THE MASTER DEVELOPMENT AGREEMENT (this “Agreement”) entered into by and among the **CITY OF NORTH MYRTLE BEACH, SOUTH CAROLINA** (the “City”), a South Carolina municipal corporation, **HENRY ROAD WEST, LLC**, a South Carolina limited liability company (“Henry Road”) and **EDGEWATER INDUSTRIAL, LLC**, a South Carolina limited liability company (“Developer”).

RECITALS:

WHEREAS, the City, Henry Road, Reach 9, LLC, a South Carolina limited liability company (“Reach 9”), Apache Properties, LLC, a South Carolina limited liability company (“Apache”), RW Hills, LLC, a South Carolina limited liability company (“RW”), CW Hills, LLC, a South Carolina limited liability company (“CW”), JW Holiday Family, LLC, a South Carolina limited liability company (“Holiday”), Myrtle Beach National Company (“MB National”), Seashore Farms, LLC, a South Carolina limited liability company (“Seashore”) and LL Chestnut, LLC, a purported South Carolina limited liability company (“LL Chestnut”) entered into that certain Master Development Agreement, dated January 9, 2009, recorded January 20, 2009 in Deed Book 3382 at Page 3357, and re-recorded in Deed Book 3383 at Page 1662 to include signature pages, all in the public records of Horry County, South Carolina (the “Master Development Agreement”); and

WHEREAS, the Master Development Agreement as amended, by the City and the then current owners of all of the Land which is subject to the Master Development Agreement, by that certain First Amendment to Master Development Agreement, dated March 23, 2020 and effective December 16, 2019, recorded March 24, 2020 in Deed Book 4298 at Page 2823 to include all signature pages, in the public records of Horry County, South Carolina (the “First Master Amendment”), which First Master Amendment provided, among other things, for the negotiation by and between the City and any of the then current Landowners, of amendments to certain public benefits agreed to by the City and the Landowners, at the time of any proposed amendment to the Master Site Plan, or the PDD, by an individual Landowner, which amendments would be separate and independent of any other amendments, and applicable only to the portions of the Land owned by the Landowner, or its successors and assigns, proposing such amendment to the Master Site Plan or the PDD, which separate and independent amendment would be evidenced by a written amendment; and

WHEREAS, the Master Development Agreement and the First Master Amendment are hereinafter sometimes collectively referred to as the “Development Agreement”; and

WHEREAS, the Development Agreement, unless deemed extended by executive order of the Governor of South Carolina, was executed on January 9, 2009, and expires on January 9, 2029; and

WHEREAS, as a result of a scrivener’s error, LL Chestnut, which was never organized as a South Carolina limited liability company, and did not appear in the chain of title for any of the properties subject to the Master Development Agreement, should have instead been referred to as J.B. Chestnut Limited Liability Company, a South Carolina limited liability company (“**JB Chestnut**”), which was the owner of record of the tract referred to in the Master Development Agreement as the “LL Chestnut Tract”; and

WHEREAS, the real property owned by Henry Road at the time of the Master Development Agreement and the First Master Amendment is herein referred to as the “**Henry Road Tract**”; and

WHEREAS, Henry Road has proposed an amendment to the Master Site Plan and the PDD (collectively the “**PDD Amendment**”), for a portion of the real property owned by Henry Road, West of S.C. Highway 31, within the PDD, an unrecorded map of which is attached hereto as **Exhibit “A”** (the “**Amended Site Plan Parcel**”) which PDD Amendment is approved by the City simultaneously with the approval of this Agreement; and

WHEREAS, any portion of the Henry Road Tract which is not included in the Amended Site Plan Parcel shall remain subject to the terms and provisions set forth in the Master Development Agreement, as amended by the First Master Amendment, shall not be subject to this Agreement, without further amendment except by one or more separate and independent amendments for the portions of the Henry Road Tract which are not included in the Amended Site Plan Parcel;

WHEREAS, the Parties now desire to enter into a separate and independent amendment to the Development Agreement, in order to specify certain fees and obligations imposed by the City pursuant to the Development Agreement, as amended, which would only be applicable to the Amendment Site Plan Parcel portion of the PDD, in the manner set forth below.

NOW, THEREFORE, for and in consideration of the covenants and conditions herein, and the sum of Five and No/100 (\$5.00) Dollars, to each party by the other paid, the parties agree as follows:

1. **Continuing Encumbrance**. Despite any change in ownership and/or the configuration and boundaries of the various tracts subjected to the Development Agreement, as amended, and the Exhibits to the Development Agreement, previously subjected to the Development Agreement, as amended, by this Agreement, except as hereby expressly amended or supplemented, shall remain in full force and effect. Notwithstanding any change in ownership and/or the configuration or boundaries of the Henry Road Tract and the Apache Tract subjected to the Development Agreement, as amended, and the Exhibits attached to the Development Agreement, including the obligations regarding the Traffic Circle, which was dedicated as a public road as of August 2021, whether previously and currently encumbered by the Development Agreement, as amended by this Agreement, except as hereby expressly amended or supplemented, all terms and provisions of the Development Agreement relating to the Henry Road Tract, including any portion of the Henry Road

Tract which is included in the Amended Site Plan Parcel, shall remain in full force and effect (the “Continuing Encumbrance”).

2. **Amendment to Section 2.13.** In accordance with the Continuing Encumbrance provision contained herein and solely with respect to the Amended Site Plan Parcel, Section 2.13 of the Development Agreement, as amended, is further amended to acknowledge the Traffic Circle, as defined in Section 2.13, has been dedicated as a public road as of August 2021.

3. **Wetland/Wetland Buffer Maintenance.** In accordance with the Continuing Encumbrance provision contained herein, Henry Road acknowledges and agrees that the Amended Site Plan Parcel includes those areas identified by the United States Army Corps of Engineers (“Corps”) and/or the South Carolina Department of Health and Environmental Control (“DHEC”) or any other applicable governmental authority as wetland areas subject to the regulation of the Corps and/or DHEC (“Jurisdictional and Non-Jurisdictional Waters of the State of South Carolina and the United States”) which are located adjacent to Water Tower Road. Unless and until such Jurisdictional and Non-Jurisdictional Waters of the State of South Carolina and the United States are filled or otherwise mitigated to no longer remain classified as Jurisdictional and Non-Jurisdictional Waters of the State of South Carolina and the United States, Henry Road agrees that all on-site Jurisdictional and Non-Jurisdictional Waters of the State of South Carolina and the United States not filled or modified pursuant to permits issued by the governmental entities having jurisdiction over such on-site Jurisdictional and Non-Jurisdictional Waters of the State of South Carolina and the United States, shall be surrounded with a minimum 20-foot wide water quality buffer within which no building shall occur. These buffer areas and the Jurisdictional and Non-Jurisdictional Waters of the State of South Carolina and the United States they surround shall be maintained in common ownership, shall remain natural except to the extent vegetation is trimmed to maintain required sight triangle distances along Water Tower Road.

4. **Improvements to Water Tower Road.** In accordance with the Continuing Encumbrance provision contained herein, Henry Road, or its successor in title to the Amended Site Plan Parcel only, as a condition to the improvement of the Amended Site Plan Parcel, shall, at the expense of the owner of the Amended Site Plan Parcel:

(A) Widen the paved section of Water Tower Road, within the existing public right-of-way of Water Tower Road, to accommodate a turning movement, concurrently with the sitework improvements for the first building within the Amended Site Plan Parcel, such improvements being either (i) complete; or (ii) bonded in accordance with the City’s typical roadway improvement bonding standards, at or prior to the issuance of a certificate of occupancy for the first building within the Amended Site Plan Parcel. A map of such improvements to Water Tower Road is attached hereto as **Exhibit “D”** (the “**Road Improvement Exhibit”), which road improvements shall be at the sole cost and expense of Developer.**

(B) The City intends to improve Water Tower Road to comply with the Complete Streets portion of the City’s land development regulations, provided however, that as of the date of this Amendment, the existing roadway section of Water Tower Road does not allow for installation of sidewalks or street trees, and therefore, in lieu of sidewalks and street trees being installed during the development of the Amended Site Plat Parcel, the owner of the Amended Site Plan Parcel, will

contribute to the City, based upon an engineer's estimate approved by the City, an amount equal to One Hundred Fifteen Thousand and No/100 (\$115,000.00) Dollars, in two separate and equal installments, the first of such installments due and payable on or before the issuance of the building permit of the first building within the Amended Site Plan Parcel, and the second of such installments due and payable on or before the issuance of the certificate of occupancy for the first building within the Amendment Site Plan Parcel, to be used by the City for improvement of Water Tower Road.

(C) Developer shall install or cause to be installed, streetlights within the Project, together with streetlights along the boundary of the Project with Water Tower Road, in accordance with the Code of Ordinances. To the extent such streetlights are located within the public right-of-way of Water Tower Road, following the installation of such streetlights at the expense of Developer, the City shall thereafter contribute toward the monthly cost for each streetlight in an amount equal to the costs for the base street light fixture offered by the utility provider. The remaining monthly cost for each streetlight, including additional charges associated with an enhancement street light fixture, if any, shall be borne by the Developer and/or Owners Association established by Developer for the Amended Site Plan Parcel.

(D) Developer specifically covenants and agrees not to subject the Property to a conservation easement or other restrictive covenant, whereby any portion of the Property shown as single family homes or amenities on the approved Concept Plan is restricted for future development of such portion of the Property, the same shall also constitute a Developer Default hereunder, provided that, for purposes of this Agreement any conveyance to the Owners Association shall not be deemed such an easement or restriction, and shall not constitute a Developer Default.

Developer must maintain the Property consistent with the Code of Ordinances of the City, provided that, at a minimum, Developer will mow the undeveloped Property no less than eight times per year until the Project is fully developed. The mowing shall occur in the periods between March 1 and November 30 of each calendar year. In addition, until the Project is fully developed, the Developer shall remove any fallen trees on the Property, such tree removal to occur during the same periods set out for mowing above. The Developer shall be given a reasonable period of time to be determined by the City Manager or his designee, to mow the Property and remove fallen trees on the Property in the event of a hurricane, rain event or other force majeure that prevents the Developer from complying with the mowing/maintenance schedule referenced above.

If the Developer fails to comply with the scheduled time frames for mowing and removal of fallen trees, as determined by the City Manager or his designee, then the City shall have the right to enter the Property for the purpose of mowing and removing any fallen trees, and the Developer shall reimburse the City for the costs of such mowing and/or tree removal in an amount equal to One Hundred (100%) percent of such the costs incurred by the City for mowing and/or tree removal. In the event Developer should fail to reimburse the City within Thirty (30) days of the date an invoice is delivery by the City to the Developer, the City may place a lien upon the Property, which lien shall be enforceable in the same manner as a property tax lien, which may only be satisfied by payment thereof.

(E) Developer agrees that the development of the Amended Site Plan Parcel shall incorporate not less than Twenty (20%) percent open space, which for purposes of this Agreement shall include protected wetlands, required buffers, ponds, lakes, open spaces, green space or other undeveloped acreage which is within the Amended Site Plan Parcel.

(F) Pursuant to Title 6, Chapter 31, Section 120 of the Code of Laws for the State of South Carolina, this Agreement shall be recorded in the public records of Horry County, South Carolina, on or before the date which is Fourteen (14) days following the date on which the City Council of the City approves this Agreement at second and final reading.

5. **Master Site Plan.** The master site plan for the Amended Site Plan Parcel, which is the same site plan incorporated in the PDD, as amended, is attached hereto as **Exhibit “B”** (the “**Master Site Plan**”). In addition, attached hereto as **Exhibit “C”** is a map showing the relationship between the Amended Site Plan Parcel and the previously approved Palmetto Industrial Park, adjacent to the Amended Site Plan Parcel, which also reflects a revision in the boundary of the previously approved Palmetto Industrial Park, in order to accommodate the Project (the “**Project Boundary Adjustment Exhibit**”).

6. **Independent Amendment.** In accordance with the Continuing Encumbrance provision contained herein, this Separate and Independent Amendment to Master Development Agreement is intended to be applicable only to the Amended Site Plan Parcel, which is a portion of the Henry Road Tract, and shall not be deemed applicable to any other portion of the Land which is subject to the Development Agreement, as amended, or to any other Landowner within the PDD, who is not a successor or assign of Henry Road.

8. **No Further Amendment.** In accordance with the Continuing Encumbrance provision contained herein, except as specifically amended by this Separate and Independent Amendment to Master Development Agreement all of the terms and conditions of the Development Agreement as amended, shall remain in full force, unless and until amended in a writing signed by all of the parties.

IN WITNESS WHEREOF, the Parties have executed this Agreement the date below their respective signatures.

[Individual signature pages follow for each of the Parties]

EXHIBIT "D"

Road Responsibility Exhibit

